STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KENNETH D. CRAVEY,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 10-5016
	)	
LAKESIDE BEHAVIORAL HEALTH CARE,	)	
	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on September 13, 2010, in Orlando, Florida, before Jeff B. Clark, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Kenneth D. Cravey, pro se
1201 Lavanham Court
Apopka, Florida 32712

For Respondent: Deborah L. La Fleur, Esquire
Matthew A. Klein, Esquire
GrayRobinson, P.A.
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STATEMENT OF THE ISSUE

Whether Respondent discriminated against Petitioner on the basis of his age as stated in the Petition for Relief, in violation of Subsection 760.10(1), Florida Statutes (2010).

PRELIMINARY STATEMENT

On November 24, 2009, Petitioner, Kenneth D. Cravey, filed an Employment Complaint of Discrimination based on age with the Florida Commission on Human Relations ("FCHR"). On June 3, 2010, FCHR advised Petitioner that it had made a "Determination: No Cause" after an investigation of his complaint. On July 6, 2010, Petitioner filed a Petition for Relief from an Unlawful Employment Practice with FCHR, alleging that Respondent, Lakeside Behavioral Health Care, treated him disparately and discharged him from employment based on age.

On July 9, 2010, FCHR referred the matter to the Division of Administrative Hearings for assignment of an Administrative Law Judge to conduct a hearing on the allegations of employment discrimination made by Petitioner. On July 12, 2010, an Initial Order was sent to both parties requesting mutually convenient dates for a final hearing. Based on the response of the parties, a final hearing was scheduled on September 13, 2010.

The hearing was held on September 13, 2010, as scheduled. Petitioner testified on his own behalf. Respondent presented six witnesses: Laura Gailey, Vicki Garner, Dr. Joe Clemens, Eric Krauskopf, Kelley Aubin and Maureen Nicholas-Chance. Joint Exhibits 1 through 49 were stipulated into evidence and marked accordingly.

The Transcript of the hearing was filed with the Division of Administrative Hearings on October 26, 2010. Both parties timely submitted Proposed Recommended Orders.

All statutory references are to Florida Statutes (2010), unless otherwise noted.

FINDINGS OF FACT

Based upon the testimony and evidence received at the hearing, the following facts were established by clear and convincing evidence:

1. Respondent is a mental health facility and employs more than 15 persons.

2. Petitioner was hired as an Assessment Specialist II on February 18, 2008. At the time he was discharged, he was 51 years old.

3. An Assessment Specialist II performs mental health assessments of individuals brought to Respondent's facility by law enforcement, hospital transfers, or walk-ins. As part of his job duties, Petitioner also provided crisis intervention, diagnostic impression, and referral information as part of an initial assessment to clients who sought services at Respondent's facility.

4. Completion of the assessments are important, because the doctors review them to assist them in determining the direction to take for treatment.

5. Respondent observed that Petitioner's monthly average productivity, measured in assessments performed per shift, was well below that of the other assessment specialists who worked the same shift as Petitioner and that his assessments were of poor quality. In response, Petitioner's supervisors counseled him, provided Petitioner with written warnings, and, eventually, placed Petitioner on a 30-day Performance Improvement Plan. Petitioner was informed that he had to increase his productivity to a goal of an average of three assessments per shift.

6. Other assessment specialists were also disciplined and/or terminated for low productivity and poor quality of assessments. These employees were also told to average three assessments per shift during their performance evaluations, and while they sometimes did not achieve that goal, their performance showed significant improvement, as compared with Petitioner.

7. At the conclusion of the 30 days provided under the Performance Improvement Plan, Petitioner's productivity had only slightly improved and not to the goal of three assessments per shift. As a result, Respondent terminated Petitioner's employment on February 17, 2009.

8. The consensus among the witnesses was that the quality of Petitioner's mental health assessments was poor and his

productivity was unacceptably low. This consensus is accepted as credible and was the basis for Petitioner's discharge.

9. Petitioner was disciplined for selling personal items while at work and claims disparate treatment. The basis for his discharge is poor performance, not selling personal items while at work.

10. Evidence was presented by both parties regarding the fact that Petitioner was not promoted within Respondent's organization; the Petition for Relief is silent regarding this issue. The evidence on this subject indicated that Petitioner submitted his application three days after the period for applications closed.

CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of these proceedings. § 120.57(1), Fla. Stat.

12. Subsection 760.10(1), Florida Statutes, in relevant part, makes it an unlawful employment practice for Respondent to discriminate against Petitioner because of Petitioner's age. Chapter 760, Florida Statutes, entitled the Florida Civil Rights Act, adopts the legal principles and judicial precedent set forth under Title VII of the Civil Rights Act of 1964, as amended. 42 U.S.C. § 2000, et seq.; King v. Auto, Truck, Indus. Parts and Supply, Inc., 21 F. Supp. 2d 1370 (N.D. Fla. 1998);

Carlson v. WPLG/TV-10, Post-Newsweek Stations of Florida, 956 F. Supp. 994 (S.D. Fla. 1996).

13. The United States Supreme Court has established an analytical framework within which courts should examine claims of discrimination, including claims of age discrimination. In cases alleging discriminatory treatment, Petitioner has the initial burden of establishing, by a preponderance of the evidence, a prima facie case of discrimination. St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993); Combs v. Plantation Patterns, 106 F.3d 1519 (11th Cir. 1997).

14. Petitioner can establish a prima facie case of discrimination in one of three ways: (1) by producing direct evidence of discriminatory intent; (2) by circumstantial evidence under the framework in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed. 668 (1973); or (3) by establishing statistical proof of a pattern of discriminatory conduct. Carter v. City of Miami, 870 F.2d 578 (11th Cir. 1989). If Petitioner cannot establish all of the elements necessary to prove a prima facie case, Respondent is entitled to entry of judgment in its favor. Earley v. Champion International Corp., 907 F.2d 1077 (11th Cir. 1990).

15. To establish a prima facie case of discrimination, Petitioner must show: that he is a member of a protected class; that he suffered an adverse employment action; that he received

disparate treatment from other similarly situated individuals in a non-protected class; and that there is sufficient evidence of bias to infer a causal connection between his age and the disparate treatment. Andrade v. Morse Operations, Inc., 946 F. Supp. 979 (M.D. Fla. 1996).

16. Petitioner made a prima facie showing that due to his age, he is a member of a protected class and that he suffered an adverse employment action--he was discharged. However, Petitioner failed to make a prima facie showing that he received dissimilar treatment from individuals in a non-protected class or that there was any bias against Petitioner. Even if evidence of bias did exist, it was insufficient to infer a causal connection between Petitioner's age and the alleged disparate treatment.

17. Petitioner's case is predicated on his allegation that he was discharged because he failed to perform three mental health assessments and that others, who similarly did not produce three assessments, were not discharged. This was affirmatively denied by his supervisors, who report that his mental health assessments were of low quality and that his productivity was unsatisfactory. Other than his testimony regarding his belief that he had been discriminated against based on his age, Petitioner offered no other evidence--direct, circumstantial, or statistical--of the alleged discrimination.

18. If Petitioner had satisfied his burden of establishing a prima facie case of discrimination, an inference would have arisen that the adverse employment action was motivated by a discriminatory intent. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The burden would have then shifted to Respondent to articulate a legitimate, non-discriminatory reason for its action. Id.

19. Respondent articulated a legitimate, non-discriminatory reason for its action. Respondent demonstrated that Petitioner's performance was inadequate.

20. Once Respondent successfully articulates a non-discriminatory reason for its action, the burden shifts back to Petitioner to show that the proffered reason is a pretext for unlawful discrimination. Petitioner must provide sufficient evidence to allow a reasonable fact-finder to conclude that the proffered reason is not the actual motivation for the adverse employment action. Standard v. A.B.E.L. Services, Inc., 161 F.3d 1318 (11th Cir. 1998).

21. Petitioner may show that Respondent's articulated reason is a pretext by showing that the non-discriminatory reason should not be believed; or by showing that, in light of all the evidence, discriminatory reasons more likely motivated the decision than the proffered reason. Id. Petitioner did

neither. Petitioner failed to present any evidence showing that Respondent either should not be believed or that discriminatory reasons, rather than the proffered reason, more likely motivated the adverse employment action.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Florida Commission on Human Relations enter a final order finding that Respondent, Lakeside Behavioral Health Care, did not discriminate against Petitioner, Kenneth D. Craven, and dismissing the Petition for Relief.

DONE AND ENTERED this 15th day of December, 2010, in Tallahassee, Leon County, Florida.

JEFF B. CLARK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of December, 2010.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.